

## § 821.56

§ 821.19 shall apply, modified as necessary to meet the exigencies of this subpart's accelerated timeframes.

### § 821.56 Hearing and initial decision or appealable order of law judge.

(a) *Notice of hearing.* Within 3 days after the date on which the Board receives the Administrator's complaint, or immediately upon the issuance of a law judge's order disposing of a petition for review of the Administrator's emergency determination, if later, the parties shall be served with a written notice of hearing, setting forth the date, time and place of the hearing. The hearing shall be set for a date no later than 30 days after the date on which the respondent's appeal was received and docketed. To the extent that they are not inconsistent with this section, the provisions of § 821.37(a) shall also apply.

(b) *Conduct of hearing.* The provisions of §§ 821.38, 821.39 and 821.40, concerning the taking of evidence, argument and submissions by the parties, and the composition of the hearing record, shall apply to proceedings governed by this subpart.

(c) *Initial decision and effect of initial decision or appealable order.* The law judge's initial decision shall be made orally on the record at the termination of the hearing. The provisions of § 821.42, concerning the content of the initial decision, the furnishing of copies of the initial decision to the parties and the issuance date of the initial decision, and the provisions of § 821.43, concerning the effect of the law judge's initial decision or appealable order and any appeal therefrom, shall apply to proceedings governed by this subpart.

### § 821.57 Procedure on appeal.

(a) *Time within which to file notice of appeal.* A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 2 days after the date on which the initial decision was orally rendered or the appealable order was served. The time limitations for the filing of documents respecting appeals governed by this subpart will not be extended by reason of

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the unavailability of the hearing transcript.

(b) *Briefs and oral argument.* Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the notice of appeal was filed, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile confirmed by personal or first-class mail delivery of the original. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of § 821.48 shall apply.

(c) *Issues on appeal.* The provisions of § 821.49(a) shall apply in proceedings governed by this subpart.

(d) *Petition for rehearing, reargument, reconsideration or modification of order.* The only petitions for rehearing, reargument, reconsideration or modification of an order which the Board will entertain in proceedings governed by this subpart are those based on the ground that new matter has been discovered. Such petitions must:

- (1) Set forth the new matter;
- (2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
- (3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

### Subpart J—Ex Parte Communications

AUTHORITY: Sec. 4, Pub. L. 94-409, 5 U.S.C. 556(d) and 557; 49 U.S.C. 1101-1155, 44701-44723, 46301.

### § 821.60 Definitions.

As used in this subpart:

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*Board decisional employee* means a Board Member, law judge or other employee who is, or who may reasonably be expected to be, involved in the decisional process of the proceeding;

*Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part.

### § 821.61 Prohibited ex parte communications.

(a) The prohibitions of this section shall apply from the time a petition for review or an appeal is filed unless the person responsible for the communication has knowledge that a petition for review or an appeal will be filed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge. Such prohibitions shall continue until the time of the Board's final disposition of the petition, appeal and any ancillary matters, such as the adjudication of a claim for fees and expenses under the Equal Access to Justice Act.

(b) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board decisional employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board decisional employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding. Ex parte communications solely relating to matters of Board procedure or practice are not prohibited by this section.

### § 821.62 Procedures for handling ex parte communications.

A Board decisional employee who receives, makes or knowingly causes to be made a communication prohibited by § 821.61 shall place in the public record of the proceeding:

(a) All such written communications;

(b) Memoranda stating the substance of all such oral communications; and

(c) All written responses, and memoranda stating the substance of all oral responses, to the communications described in paragraphs (a) and (b) of this section.

### § 821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication made or knowingly caused to be made by a party in violation of § 821.61, the presiding law judge (or the chief law judge, if the proceeding has not been assigned to a law judge) or the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interest of justice and the policy of the underlying statutes it administers, consider a violation of § 821.61 sufficient grounds for a decision adverse to a party who has knowingly committed or knowingly caused such a violation to occur. Alternatively, the Board may impose a sanction on the party's attorney or representative, including suspending or barring the attorney or representative from practicing before it, where such action would be appropriate and penalizing the party represented would not be in the interest of justice.

## Subpart K—Judicial Review of Board Orders

### § 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals within 60 days of the date of entry (*i.e.*, service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should